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GLOMAC ALLIANCE SDN BHD v. NORDIN MD ZAIN

COURT OF APPEAL, PUTRAJAYA
NOR BEE ARIFFIN JCA
LEE HENG CHEONG JCA
MARIANA YAHYA JCA

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[CIVIL APPEAL NO: B-02(NCvC)(A)-1392-10-2020]
25 JANUARY 2023

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Abstract – *The absence of a privity of contract between the plaintiff and the defendant renders any originating summons initiated by the plaintiff as a non-starter as the plaintiff would have no cause of action against the defendant.*

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CONTRACT: *Agreement – Sale and purchase agreement – Privity of contract – New contract entered between vendor and purchaser ('defendant') – Whether excluded units sold to plaintiff as property buyer – Whether plaintiff could enforce new agreement to compel defendant to vest legal and beneficial ownership of property and deliver vacant possession to plaintiff – Whether plaintiff had contractual rights – Whether plaintiff had cause of action against defendant – Whether there was privity of contract between plaintiff and defendant*

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By a sale and purchase agreement ('principal agreement') between the respondent ('plaintiff'), Score Option Sdn Bhd ('Score Option') who was the registered and beneficial owner of the land ('land') and Austral Development Sdn Bhd ('Austral Development') who was granted the absolute right by Score Option to develop the said land into a housing development, the

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plaintiff purchased a two-storey and a half link house in the Austral Yarra Link housing development ('property'). Subsequently, both Score Option and Austral Development went into winding up and liquidators were appointed. The receivers and managers of Score Option entered into a sale and purchase agreement with the appellant ('defendant'), Glomac Alliance

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Sdn Bhd ('Glomac agreement') for a consideration of RM77 million to sell the land on which Austral Yarra Link was developed to the defendant but strictly excluded 198 houses ('sold units') that were already sold by Austral Development to purchasers in the Austral Yarra Link development. The property purchased by the plaintiff was one of the sold units. The plaintiff

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contended that s. 7A of the Glomac agreement imposed an obligation upon the defendant to complete the construction and development of those uncompleted sold units at its own costs and expenses and hand over vacant possession to the purchasers in Austral Yarra Link including to the plaintiff. However, despite the defendant having completed the construction of the

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sold units, the defendant refused to transfer legal and beneficial ownership and deliver vacant possession of the said property to the plaintiff. The defendant maintained that the principal agreement was null and void, and

therefore initiated a suit at the Sessions Court ('previous suit') against the plaintiff for, among others, a declaration that the principal agreement was null and void and the defendant was the rightful and/or beneficial owner of the said property. The Sessions Court dismissed the previous suit *ie*, the principal agreement was held to subsist. The defendant appealed to the High Court and the Court of Appeal and both appeals were dismissed. In the present originating summons, the plaintiff sought, *inter alia*, the following reliefs: (i) a declaration that the plaintiff was the legal owner of the said property; and (ii) for the defendant to take all steps required to vest the legal and beneficial ownership of the said property on the plaintiff by executing all necessary documents including but not limited to the memorandum of transfer (Form 14A) in favour of the plaintiff. In the High Court, the Judicial Commissioner ('JC') held and concluded that the plaintiff, as the true owner of the said property, was entitled to have the title of the said property transferred to him free from encumbrances and also the vacant possession of the said property. Hence, the defendant appealed. The issue that arose was whether the plaintiff could rely on and/or enforce the Glomac agreement as against the defendant and compel the defendant to take all steps required to vest the legal and beneficial ownership of the property on him as well as deliver vacant possession of the property to the plaintiff.

Held (allowing appeal)
Per Mariana Yahya JCA delivering the judgment of the court:

(1) The parties contracted in the Glomac agreement were between Score Option as vendor acting through and by the receivers and managers and Glomac Alliance Sdn Bhd as the purchaser. There were express provisions stating that property sold to the defendant excluded the sold units. Under the Glomac agreement, s. 2.01 defined 'existing purchasers' as the existing purchasers of the sold units and existing purchaser shall mean each or any one of them and where the context so requires, their respective successors in title, permitted assigns, heirs, estate or personal representatives, as the case may be, whose respective sale and purchase agreement for their purchase of the respective sold units had not been terminated. After having perused the entire agreement, nowhere in the Glomac agreement was it stated that the plaintiff was a party to the agreement. There was not even an assignment or rights of novation of the Glomac agreement to the plaintiff. The plaintiff, by virtue of the doctrine of privity of contract, had no privity of contract with the defendant under the Glomac agreement. (paras 38, 40 & 41)

(2) Upon reading the entire s. 7A of the Glomac agreement, the said section did not in any way impose any obligation on the defendant to hand over vacant possession to the existing purchasers including the plaintiff. On the contrary, the defendant under s. 7A.01(i) of the Glomac agreement was entitled to deal directly with the existing purchasers of such

A uncompleted sold units. There was no documentary evidence adduced to show that the defendant had entered any novation agreements or other terms takeover with the plaintiff. There was no express provision on assignment of rights of Austral Development nor of Score Option to the defendant. In so far as the Glomac agreement was concerned, the
B defendant did not enter into a new sale and purchase agreement with the plaintiff in relation to the property. The defendant had no obligation to vest the legal and beneficial ownership as well as deliver vacant possession of the said property under the Glomac agreement. (paras 44-46)

C **(3)** The plaintiff clearly could not seek an order to compel the defendant to carry out the responsibilities and obligations of the vendor *ie*, Austral Development under the principal agreement, particularly when the defendant was not even a party to the principal agreement and there was no privity of contract between the plaintiff and the defendant. The
D plaintiff therefore had no contractual rights against the defendant in relation to the said property and no recourse against the defendant under the Glomac agreement. (paras 47 & 48)

(4) The JC was plainly wrong in allowing the plaintiff's case. There was an insufficient judicial appreciation of evidence. The JC erred when he
E made orders and grant reliefs in favour of the plaintiff that flowed from or consequential upon or ancillary to the decision of the courts in the previous suit without taking into any consideration on one single issue on its merits tendered by the defendant *ie*, whether the plaintiff had any contractual rights to enforce his rights under the Glomac agreement
F against the defendant. The absence of a privity of contract between both the plaintiff and the defendant under the Glomac agreement rendered the originating summons a non-starter. Not only did the plaintiff have no cause of action against the defendant but he also had no recourse against the defendant under the Glomac agreement. The JC also did not
G consider whether the plaintiff had *locus standi* to commence legal proceedings *vide* the originating summons premised on the Glomac agreement. As a result, the JC had committed an error in his decision which required interference from this court to correct the decision. (paras 52 & 53)

H **Case(s) referred to:**

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***

Kepong Prospecting Ltd & Ors v. Schmidt [1967] 1 LNS 67 PC ***(refd)***

Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors [2020] 10 CLJ 1 FC ***(refd)***

I *Suwiri Sdn Bhd v. Government Of The State Of Sabah [2008] 1 CLJ 123 FC* ***(refd)***

For the appellant/defendant - Douglas Yee & Lim Pit Feng; M/s Douglas Yee
For the respondent/plaintiff - S Thisinayagam A Somasundram; M/s Nayagam & Partners

[Editor's note: For the High Court judgment, please see Nordin Md Zain v. Glomac Alliance Sdn Bhd [2021] 2 CLJ 133 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Mariana Yahya JCA:

Introduction

[1] This is an appeal against the judgment of the learned Judicial Commissioner of the High Court at Shah Alam dated 15 September 2020 which had allowed the respondent's application for originating summons (encl. 1) with costs of RM20,000 to the respondent.

[2] The appellant was the defendant in the court below while the respondent was the plaintiff. The parties shall be referred to as they were in the court below.

Brief Facts

[3] The facts can be elucidated from the records of appeal and the written submission of both counsels. Score Option Sdn Bhd (Company No. 550356-V) ('Score Option') was the registered and beneficial owner of the land held under Geran HS(D) 112510 No. PT 2063, Mukim and District of Petaling, Selangor Darul Ehsan measuring approximately 200 acres ('the said land').

[4] Austral Development Sdn Bhd. (Company No. 638830-A) ('Austral Development') was granted the absolute right by Score Option to develop the land into a housing development known as Austral Yarra Link.

[5] By a sale and purchase agreement dated 15 January 2010 ('principal agreement') between the plaintiff, Austral Development and Score Option, the plaintiff purchased a 2 1/2 storey link house known as Lot No. 69, Jalan Metro 1/10A, measuring approximately 153 square metres in the Austral Yarra Link housing development ('the said property').

[6] Receiver and managers ('receivers and managers' of Score Option were appointed on 29 January 2010 pursuant to a debenture dated 10 April 2008 between Malayan Banking and Score Option. Subsequently, both Score Option and Austral Development went into winding-up and liquidators were appointed on 5 December 2014 and 20 January 2015.

[7] On 21 January 2011, the receivers and managers of Score Option entered into a sale and purchase agreement with the defendant ('Glomac agreement') for a consideration of RM77 million to sell the land on which

A Austral Yarra Link was developed to the defendant but strictly excluded 198 houses ('known as sold units') that were already sold by Austral Development to purchasers in the Austral Yarra Link development. The property purchased by the plaintiff was one of the sold units.

B **[8]** The plaintiff contended that s. 7A of the Glomac agreement imposes an obligation upon the defendant to complete the construction and development of those uncompleted sold units at its own costs and expenses and hand over vacant possession to the purchasers in Austral Yarra Link including to the plaintiff. However, despite the defendant having completed the construction of the sold units, the defendant refuses to transfer legal and C beneficial ownership and deliver vacant possession of the said property to the plaintiff.

[9] The defendant maintained that the principal agreement was null and void, and therefore initiated a suit at the Shah Alam Sessions Court *vide* Civil Suit No. B52NCvC-259-11-2015 ('previous suit') against the plaintiff for D among others, a declaration that the principal agreement was null and void and the defendant was the rightful and/or beneficial owner of the said property. The defendant in the previous suit was the plaintiff. Whereas the plaintiff in the previous suit was the defendant.

E **[10]** The Sessions Court dismissed the previous suit *ie*, the principal agreement was held to subsist. The defendant appealed to the High Court and the Court of Appeal and both appeals were also dismissed.

[11] In the present originating summons (encl. 1) ('present OS'), the plaintiff sought the following reliefs:

F (i) a declaration that the plaintiff is the legal and owner of a 2 1/2 storey linked house known as Lot No. 69 (Jalan Metro 1/10A) measuring approximately 153 square metres in the Austral Yarra Link housing development ('said property') which was purchased by way of a sale and purchase agreement dated 15 January 2020 between the plaintiff, G Austral Development Sdn Bhd (company No. 638830-A) and Score Option Sdn Bhd (Company No. 550356-V);

(ii) an order that within 14 days of this order the defendant take all steps required to vest the legal and beneficial ownership of the said property on the plaintiff by executing all necessary documents including but not H limited to the memorandum of transfer (Form 14A) in favour of the plaintiff;

(iii) an order that if the defendant fails to comply with Prayer No. 2 hereinabove within 14 days of this order, the Deputy Registrar of the Shah Alam High Court is authorised to execute all necessary legal I documents including but not limited to a memorandum of transfer (Form 14A) in favour of the plaintiff to vest the legal and beneficial ownership of the said property on the plaintiff;

(iv) an order that the defendant within 14 days of this order forward to the plaintiff's solicitors all security documents including but not limited to the issue documents of title and any other document necessary to vest the legal and beneficial ownership of the said property on the plaintiff;

(v) an order that within 14 days of this order the defendant delivers vacant possession of the said property to the plaintiff;

(vi) the cost of this action is paid by the defendant to the plaintiff; and

(vii) any further or other reliefs deemed fair and just by the court.

High Court's Findings

[12] The learned Judicial Commissioner held that as the courts in the previous suit have decided that the plaintiff is the true owner of the said property and the defendant has no right to or interest in the said property and the appeal has been exhausted, the defendant is barred or estopped by *res judicata* from re-litigation or re-opening the ownership issue in the present suit.

[13] The learned Judicial Commissioner also held that, in the previous suit, the *bona fides* of the principal agreement was one of the foundation facts of the court's decisions therein. *Res judicata* in the wider sense applies in the present suit to bar or estop the defendant from questioning the *bona fides* of the principal agreement and the *bona fides* of the contra-payment.

[14] Further, based on the previous suit's findings, the learned Judicial Commissioner held and concluded that the plaintiff as the true owner of the said property is entitled to have the title of the said property transferred to him free from encumbrances and also the vacant possession of the said property.

Grounds Of Appeal

[15] The defendant contended that the learned Judicial Commissioner had erred in fact and law on the following grounds:

(i) failed to appreciate that the plaintiff's action was founded on contract, in particular the sale and purchase agreement between the receivers and managers of Score Option Sdn Bhd and the defendant dated 21 January 2011 ('Glomac agreement');

(ii) failed to appreciate that the plaintiff was not a party to the Glomac agreement and therefore has no privity of contract with the defendant under the Glomac agreement. Therefore, the plaintiff cannot enforce and/or rely on the principal agreement as against the defendant;

A (iii) failed to appreciate that the plaintiff's rights to the property in question were pursuant to the sale and purchase agreement between Austral Development Sdn Bhd (vendor), the plaintiff (purchaser) and Score Option Sdn Bhd (proprietor) dated 15 January 2010 (principal agreement);

B (iv) failed to appreciate that the defendant was not a party to the principal agreement and therefore has no privity of contract with the plaintiff under the principal agreement. Hence, the plaintiff cannot enforce and/or rely on the principal agreement against the defendant;

C (v) failed to appreciate that the obligation to deliver vacant possession of and transfer the property to the plaintiff together with other obligations was Austral Development Sdn Bhd's (vendor) under the principal agreement and not the defendant's;

(vi) failed to appreciate that the defendant did not enter into a sale and purchase agreement with the plaintiff;

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(vii) the learned Judicial Commissioner erred in fact and law in holding that plaintiff has a good and valid cause of action against the defendant;

(viii) the learned Judicial Commissioner erred in fact and law in holding that the defendant was attempting to re-litigate or re-open the ownership issue of the property and/or re-litigate or re-contest the findings and conclusions of the courts in the previous suit; and

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(ix) the learned Judicial Commissioner erred in fact and law in holding that the orders made flow from or are consequential upon or ancillary to the decision of the courts in the previous suit.

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Defendant's Submission

[16] Briefly, the defendant contends that plaintiff has no *locus standi* to rely on and/or enforce the Glomac agreement as against the defendant due to the absence of privity of contract between plaintiff and the defendant under the Glomac agreement. In the absence of such privity of contract, the plaintiff has no cause of action against the defendant *vide* the originating summons (encl. 1) filed by the plaintiff. The suit is an abuse of the process of court and is incompetent.

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H **[17]** Further, the defendant submits that it is undisputed that the parties to the principal agreement are Austral Development (vendor), plaintiff (purchaser) and Score Option (proprietor). Any rights that the plaintiff has in relation to the property can only be derived from the principal agreement by which he purchased the property. The plaintiff continues to have those rights as the principal agreement has been held to subsist and he should enforce the principal agreement as against Austral Development and/or Score Option and not the defendant under the Glomac agreement.

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[18] The defendant also contended that it was never their intention to re-litigate the ownership issue or the findings and conclusions of the courts below in the previous suit. The court below has decided that the principal agreement had been held valid and it subsists. Therefore, the declaratory relief sought by the plaintiff in prayer 1 of the originating summons cannot stand.

[19] It was also not disputed that the obligations to plaintiff in relation to the property under the principal agreement are that of Austral Development plaintiff has absolutely no contractual rights under the Glomac agreement. Consequently, plaintiff's reliance on the Glomac agreement as his cause of action under the originating summons is fundamentally wrong.

[20] The defendant further contended that neither the Shah Alam Sessions Court *vide* Suit No. B52NCvC-259-11-2015 nor the High Court in Appeal No. BA-12BNCvC-34-06-2017 nor the Court of Appeal in Civil Appeal No. B-04(NCvC)(W)-318-07-2018 made an order for the defendant to take steps to vest the legal and beneficial ownership of the property as well as deliver vacant possession of the same to the plaintiff, or any like order.

Plaintiff's Submission

[21] It is not disputed that in 2015, the defendant commenced an action at the Shah Alam Sessions Court (previous suit) against the plaintiff for a declaration that the principal agreement was null and void and that the plaintiff is declared as the rightful and/or beneficial owner of the property. The defendant's claim was dismissed and its appeals to the High Court and the Court of Appeal were also dismissed.

[22] The plaintiff submits that in the previous proceedings, the courts made the following pertinent findings:

(i) the principal agreement subsists.

(ii) plaintiff had proved during the trial that the purchase price has been paid in full.

(iii) defendant's purchase of the land under the Glomac agreement strictly excluded the 198 sold units which also included the plaintiff's unit.

(iv) transfer of the said land to the defendant under the Glomac agreement was subjected to the rights of the existing purchasers of the sold units.

(v) by s. 7A.01(a)(i) of the Glomac agreement, it was the defendant's duty to complete the construction and development of the uncompleted sold units at its own cost and expenses.

[23] In the present suit, the plaintiff is seeking to enforce his rights against the defendant to vest legal and beneficial ownership and for vacant possession of the property. When the defendant entered into the Glomac agreement, it did so subject to the rights and interests of the existing purchasers of the sold units as set out in s. 5.02 and s. 7A.01 of the Glomac agreement.

[24] The plaintiff contends that under s. 7A.01 of the Glomac agreement, the defendant's obligation was not only to complete the construction and development of the sold units at its own cost and expenses but also to obtain the separate issue of document of title in respect of the sold units together with a valid and registrable memorandum of transfer to the purchasers of the sold units.

[25] The plaintiff further submits that the defendant has given effect to s. 7A.01 of the Glomac agreement by dealing directly with purchasers of the sold units, to the exclusion of Austral Development and hence the same should apply to the plaintiff and this forms the nexus between the parties in this action.

[26] The plaintiff also submits that the plaintiff is not suing on the Glomac agreement as such but is seeking to establish a right given to him as an owner of a sold unit under that agreement and to that extent, seeks a declaration that he is entitled to the property. The plaintiff averred that he has paid the purchase price of the property in full to Austral Development and therefore is entitled to the said property.

[27] It is the plaintiff's contentions that the previous courts have dealt all the issues raised by the defendant in this suit and therefore the defendant is barred by the doctrine of *res judicata* from re-litigating matters that were previously litigated between the parties.

Analysis/Decision

[28] It is settled principle, stated and restated in domestic and wider common law jurisprudence, that an appellate court should not interfere with the trial judge's conclusions on primary facts unless satisfied that he was plainly wrong (See: *Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors* [2020] 10 CLJ 1, FC). The Federal Court reminded the appellate judges that what is pertinent is that, the "plainly wrong" test is not intended to be used by an appellate court as a means to substitute its own decision for that of the trial court on the facts. Where in arriving at the decision it could not reasonably be explained or justified and so was one which no reasonable judge could have reached. If the decision did not fall within any of the aforesaid categories, it is irrelevant, even if the appellate court thinks that with whether whatever degree of uncertainty, if considered that it would have reached a different conclusion from the trial judge.

[29] Following the principle laid down in *Ng Hoo Kui* (*supra*), the outcome of the present appeal would therefore turn upon whether the findings of the learned trial judge were reasonably made or that the trial judge's conclusions on primary facts were plainly wrong which would allow this court to interfere with the decision.

[30] We have considered the oral and written submissions from the plaintiff and the defendant. In our view, the main issue in this appeal is whether the learned Judicial Commissioner was correct in his decision in granting the reliefs sought by the plaintiff under the Glomac agreement. We shall now deal with the grounds of appeal as stated in the memorandum of appeal.

Grounds Of Appeal Paras. 15 (i), (ii), (iii), (iv), (v) And (vi)

[31] It is pertinent to note that by the originating summons (encl. 1), the plaintiff is essentially seeking for a declaration that he is the legal and beneficial owner of the property and for an order that the defendant takes all steps to vest the legal and beneficial ownership of the property as well as deliver vacant possession of the same to him. It is also apparent that the plaintiff's originating summons (encl. 1) is premised upon the sale and purchase agreement between plaintiff, Austral Development and Score Option dated 15 January 2010 ('principal agreement') and/or agreement between the receivers and managers of Score Option and the defendant dated 21 January 2011 ('Glomac agreement').

[32] From the reading of the content of the principal agreement, it is apparent that the defendant is not a party to the principal agreement. We also observed that in the Shah Alam Sessions Court Suit (previous suit), the plaintiff had himself taken the position that the defendant was not a party to the principal agreement and has no rights under the same. The Shah Alam Sessions Court agreed and in paras. 3 and 5 of the grounds of judgment (encl. 7, pp. 504, 505 and 507 of the record of appeal), the Sessions Judge had said this:

> 3. Mahkamah mendapati berdasarkan keterangan SP1 dan SD2 tersebut jelaslah plaintif bukan pihak kepada SPA 2010 yang menjadi subject matter dalam kes ini. Maka Mahkamah mendapati bahawa plaintif bukan privy kepada SPA tersebut.
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> 5. Mahkamah berpendapat jika pun sekiranya terdapat sebarang hal-hal yang bersalahan dengan terma dan syarat kontrak, maka pihak yang sepatutnya membatalkan SPA tersebut atau membawa tuntutan ini ke Mahkamah adalah pihak Austral dan pihak Score Option dan bukannya Plaintif.

and the Shah Alam High Court (*vide* Appeal No. BA-12BNCvC-34-06-2017 as well as the Court of Appeal (*vide* Civil Appeal No. B-04(NCvC)(W)-318-07-2018) affirmed the decision.

[33] Although the plaintiff had referred the previous suit in the originating summons (encl. 1), the plaintiff had specifically pleaded that s. 7A of the Glomac agreement imposes an obligation upon defendant to complete the construction and development of those uncompleted sold units at its own costs and expenses and hand over vacant possession to the purchasers in Austral Yarra Link including the plaintiff.

[34] From the pleaded facts by the plaintiff in the originating summons (encl. 1), we find that it is apparent that the plaintiff's cause of action against the defendant is premised on the Glomac agreement and the defendant's supposed contractual obligations thereunder to the plaintiff. Hence, we agree with the defendant's learned counsel submission that the only issue in the court below was whether the plaintiff can rely on and/or enforced the Glomac agreement as against the defendant and compel the defendant to take all steps required to vest the legal and beneficial ownership of the property on him as well as deliver vacant possession of the property to the plaintiff.

The Law

[35] The law of privity of contract is well-settled. The landmark case of *Kepong Prospecting Ltd & Ors v. Schmidt* [1967] 1 LNS 67; [1968] 1 MLJ 170, the Privy Council in its judgment affirms the doctrine of privity of contract in the Contracts Act 1950. According to *Kepong Prospecting Ltd* (*supra*), a person who has provided a valid consideration under s. 2(d) of the Contracts Act 1950 cannot enforce a contract if the person is not a party to the contract. Lord Wilberforce delivered the Privy Council's opinion, at p. 174, as follows:

> *The real question which arises as to this agreement is whether it could be enforced by Schmidt who in his personal capacity was not a party to it In the first place there can, in their Lordships' view, be no doubt that if the agreement were governed by English Law, Schmidt would be unable to enforce it Their Lordships need, on this point, do no more than state their agreement with the judgment of the Federal Court which correctly stated the law from well-known passages in the opinions of the House of Lords in Dunlop Pneumatic Tyre Co Ltd v. Selfridge & Co Ltd [1915] AC 847 at p. 853 and Scruttons Ltd Midland Silicones Ltd [1962] AC 446 at p. 468. But it was suggested that in this respect the law of Malaysia differed from the law of England in admitting the principle of jus quaesitum tertio. Their Lordships are of opinion that the appellant company failed to make good this contention. Their Lordships were not referred to any statutory provision by virtue of which it couid be said that the Malaysian law as to contracts differs in so important a respect from English law.* It is true that section 2(d) of the (CA) gives a wider definition of "consideration" than that which applies in England particularly in that it enables consideration to move from another person than the promisee, but the appellant was unable to show how this affected the law as to enforcement of contracts by third parties, and it was not possible to point to any other provision having this effect. *On the contrary paragraphs (a), (b), (c) and (e) (of s. 2 CA) support the English conception of a contract as an agreement*

on which only the parties to it can sue. Reference was made to certain Indian decisions on the Indian Contract Act on which the (CA) is based. These were *Subbu Chetti Arunachazam Chettiar* (1930) ILR 53 Madras 270 (where however it was said that the balance of authority is in favour of the view that a stranger to the contract cannot without more sue to enforce it) and *Khirod Behari v. Dutt Man Gobinda* AIR 1934 Cal 682. But other decisions in a contrary sense were cited which appeared to their Lordships to be more authoritative: their Lordships refer to decisions cited in *Subbu Chetti v. Arunachazam Chettiar* and in *Pollock and Mullaon the Indian Contract Act*, 6th Edition, pp. 21 ff. and to two decisions so recent as 1957 (*Protapmull Rameswar State of West Bengal* 1957 61 CWN 78 and *Babu Ram v. Dhan Singh* AIR 1957 Punjab 169). These, in their Lordships' view, confirm that the law was correctly stated by Sir John Beaumont CJ in the Bombay case of *National Petroleum Co Ltd Popatlal* AIR 1936 Bom 344. In a passage, which though strictly obiter, was based on a full argument and consideration of the cases, the learned Chief Justice expressed the view that *Khirod Behari Dutt v. Man Gobinda* was opposed to established principle and authority. An argument on this legal issue was, so their Lordships were informed, submitted to the Federal Court: no reference to it appears in their judgment and their Lordships must assume that they did not accept it. The appellants failed to persuade their Lordships that they were wrong.

The 1954 agreement was therefore, in their Lordships' opinion, not enforceable by Schmidt against the appellant company, ...

(emphasis added)

[36] The Federal Court in *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75; [1998] 1 MLJ 393 has applied the same principles of privity of contract as decided in *Kepong Prospecting Ltd* (*supra*) and Mohd Azmi FCJ in the judgment said this:

2. The appellants were not party to the loan agreement, s. 66 could not be invoked against them. Under that section, the party who is bound to restore any advantage received or to make compensation for such advantage should be construed as 'any person' who is a party to the agreement and has received any advantage pursuant to the terms or conditions of the invalid contract, but not otherwise. To extend the meaning of 'any person' in s. 66 to strangers to the agreement would be in violation of the elementary principle of contract. Since the loan agreement was strictly between the respondent and Ismail, the court had no jurisdiction to order the appellants to pay under s. 66 merely because he had received a fraction of the loan money from Ismail, The fact that Ismail had used the loan money received from the respondent to pay other people, including the appellants, could not make them parties or privies to the contract so as to enable the court to bring them within the ambit of s 66. The appellants were not a party to the loan agreement and as such there was no question of repayment by them either by way of restitution of benefit or compensation, Moreover, the appellants as third party chargors did not receive any 'benefit'

A within the meaning of s. 66, either under the charge or the loan agreement. In the circumstances, the remedy ordered in the second order was invalid as it was made without or in excess of jurisdiction. Since the judgment under s. 66 was invalid, it followed that the order of sale of the land to satisfy the said judgment must equally fail to the ground, apart from being in violation of the prohibition B imposed by s. 13 of the Enactment (see pp. 411E-I and 412B-C).

[37] The Federal Court in the case of *Suwiri Sdn Bhd v. Government Of The State Of Sabah* [2008] 1 CLJ 123; [2008] 1 MLJ 743 also held that:

[10] The doctrine of privity of contract is that as a general rule, a contract C cannot confer rights or impose obligations on strangers to it, *ie*, persons who are not parties to it.

Glomac Agreement Dated 21 January 2011

[38] Factually, the parties contracted in the Glomac agreement are between Score Option (vendor) acting through and by the receivers and managers and D Glomac Alliance Sdn Bhd (purchaser). There are express provisions stating that property sold to the defendant excludes the sold units. Section 3.01 of the Glomac agreement between the defendant and the receivers and managers stated that:

E **Section 3.01 Agreement to sell and to purchase**

The Vendor hereby agrees to sell to the Purchaser and the Purchaser hereby agrees to purchase from the Vendor the Property as follows:

(a) strictly excluding the Sold Units;

(b) on an "as is where is" basis;

F (c) on a "willing buyer, willing seller" basis and free from encumbrances to the extent that the Transfer can be registered at the relevant land registry;

(d) without any representation or warranty by the Vendor or the Receiver and Manager of any kind whatsoever whether expressed G or implied including without limitation as to description, quality, conditions, measurements, area, suitability or fitness for purpose or vacant possession of the Property;

(e) subject to all conditions of title whether express or implied and the category of land use contained in the issue document of title to the H Property;

(f) subject to all restrictive or other covenants, easements, rights and interests and the existing category of land use affecting the Property and the Land; and

(g) subject to all liabilities and rights (if any) in connection with the I Land;

(h) subject to:

(i) the Caveats (excluding however the Mexaland Caveats (if any) and the Vendor's Directors' Caveats (if any);

(ii) matters, notices and claims affecting the Land (including but not limited to claims by the Existing Purchasers and their respective end-financiers and AM-EL Holdings Sdn. Bhd. (Company No. 203745-M);

(iii) all developments schemes or proposed development schemes affecting the Land; and

(i) upon the terms and conditions hereafter contained for the consideration stated in Section 3.02 (a). (emphasis added)

[39] Whereas s. 1.01(7) of the Glomac agreement refers to the sold units as follows:

(7) There are certain units constructed whether in whole or in part and forming part of different developments on the Land which have been sold (hereinafter referred to the "Sold Units") prior hereto to the Existing Purchasers (as hereinafter defined). To the best knowledge of the Receivers and Managers (as hereinafter defined), the Sold Units shall mean the following:

(a) residential units forming part of the buildings which have been sold by Austral Development Sdn Bhd (ADSB);

(b) vacant lots sold by ADSB;

(c) residential units sold by the Purchaser; and

(d) units which have been sold by the previous proprietor of the Land, namely Serangkai Emas Sdn Bhd (In Liquidation), referred to in the Danaharta SPA (As hereinafter defined).

Particulars of the Sold Units and information in respect thereof which are available to the Vendor are specifically set out and annexed hereto Annexure B hereof. For the avoidance of doubt, the Vendor and the Receivers and Managers do not represent and do not warrant the accuracy and correctness of the particulars and information of the Sold Units set out in Annexure B hereto.

We observed that in Annexure B, the plaintiff's name appeared at number 14 of the said list.

[40] Section 2.01 of the Glomac agreement defines "existing purchasers" as the existing purchasers of the sold units and existing purchaser shall mean each or any one of them and where the context so requires, their respective successors in title, permitted assigns, heirs, estate or personal representatives, as the case may be, whose respective sale and purchase agreement for their purchase of the respective sold units have not been terminated.

[41] After having perused the entire agreement, we find that at nowhere in the Glomac agreement stated that the plaintiff was a party to the agreement. In fact, there was not even an assignment of rights or novation of the Glomac agreement to the plaintiff. In the circumstances, it is our considered view that the plaintiff by virtue of the doctrine of privity of contract has no privity of contract with the defendant under the Glomac agreement.

[42] Further, the plaintiff in his affidavit in support of the originating summons contended that s. 7A of the Glomac agreement is applicable against the defendant. The plaintiff at para. 21 of his affidavit in support had affirmed this:

> 21. I state that Section 7A of the Glomac agreement imposes an obligation upon Defendant to complete the construction and development of those uncompleted Sold Units at its own costs and expenses and hand over vacant possession to the purchasers in Austral Yarra Link including me.

[43] We refer to s. 7A.01 of the Glomac agreement which provides as follows:

> **Section 7A.01 Purchaser's Obligations – Glomac Agreement**
>
> (a) As soon as possible upon Completion, the Purchaser shall at its own cost and expense:
>
> (i) *complete the construction and development of those uncompleted Sold Units. In this regard the Vendor hereby acknowledges, agrees and undertakes that the Purchaser shall be entitled to deal directly with the Existing Purchasers of such uncompleted Sold Units and further that the Purchaser shall be entitled to collect all progress billings in respect of the construction and development of such uncompleted Sold Units directly from the Existing Purchasers.* All progress billings collected from such Existing Purchasers shall belong completely to the Purchaser and the Purchaser shall not be liable or obliged to account to the Vendor, the Receiver and Manager or to the Chargee Bank for the same. (emphasis added)

[44] Upon reading the entire s. 7A of the Glomac agreement, it is our considered view that s. 7A of the Glomac agreement does not in any way impose any obligation on the defendant to hand over vacant possession to the existing purchasers including the plaintiff. On the contrary, the defendant under s. 7A.01(i) of the Glomac agreement is entitled to deal directly with the existing purchasers of such uncompleted sold units.

[45] There was no documentary evidence adduced to show that the defendant had entered any novation agreements or other terms takeover with the plaintiff. In fact, there was no express provision on assignment of rights of Austral Development nor of Score Option to the defendant. In so far as the Glomac agreement is concerned, the defendant did not enter into a new sale and purchase agreement with the plaintiff in relation to the property. It

is only after such new sale and purchase agreement have been entered with the respective existing purchasers that they then have the rights against the defendant in relation to their respective properties. This is consistent with s. 7A.01(vi) of the Glomac agreement which require the defendant to furnish Score Option (vendor) with such novation agreements or other terms of takeover entered into by the defendant with Austral Development's purchasers including the plaintiff.

[46] For completeness, again we conclude that the defendant has no obligation to vest the legal and beneficial ownership as well as deliver vacant possession of the said property under the Glomac agreement. In fact, if there was such an obligation, the obligation to vest the legal and beneficial ownership as well as deliver vacant possession of the said property to the plaintiff under the principal agreement was the vendor's *ie*, Austral Development. Such obligations were specifically stipulated under cls. 11 and 24 of the principal agreement dated 15 January 2020 between Austral Development (vendor), the plaintiff (purchaser) and Score Option (proprietor). For ease of reference, we refer to cls. 11 and 24 of the principal agreement which state as follows:

Clause 11: Separate document of title/transfer of title

11(1) Upon the execution of this Agreement the Vendor shall, at its own cost and expenses and as expeditiously as possible, obtain the issue of a separate document of title to the said Lot.

(2) Upon the issue of separate document of title to the said Lot and subject to the payment of the purchase price by the Purchaser to the Vendor in accordance to clause 4(1) and the observance of all the terms and conditions herein provided, *the Vendor shall, within twenty-one (21) days, execute a valid and registrable memorandum of transfer of the said Property to the Purchaser, his heir or nominee or lawful assign, as the case may be.*

Clause 24: Manner of delivery of vacant possession

24(1) Upon the issuance of a Certificate by the Vendor's architect certifying that the construction of the said Building has been duly completed and water and electricity supply are ready for connection to the said Building and the Vendor has applied for the issuance of the Certificate of Fitness for Occupation from the Appropriate Authority in compliance with the relevant provisions of the Uniform Building By-Laws 1984 and the Purchaser having paid all monies payable under sub-clause 4(1) in accordance with the Third Schedule and all other monies due under this Agreement and *the Purchaser having performed and observed all the terms and covenants on his part under this Agreement the Vendor shall let the Purchaser into possession of the said Property.* (emphasis added)

[47] We agree with the submission of learned counsel for the defendant that the plaintiff clearly cannot seek an order to compel the defendant to carry out the responsibilities and obligations of the vendor *ie*, Austral Development under the principal agreement, particularly when the defendant was not even a party to the principal agreement and there was no privity of contract between the plaintiff and the defendant.

[48] Based on settled case law, it is our respectful view that the plaintiff has no contractual rights against the defendant in relation to the said property and no recourse against the defendant under the Glomac agreement.

Grounds Of Appeal Para. 15(vii), (viii) And (ix)

[49] The learned Judicial Commissioner in para. 28 of his grounds of judgment summarily said that the defendant's issues in opposing the originating summons are, namely:

(i) the doctrine of *res judicata* prevents the issues raised in this action from being litigated due to the previous court proceedings;

(ii) plaintiff does not have the *locus standi* to initiate this action and has no cause of action against the defendant; and

(iii) defendant is not satisfied that the progress payment for the said property has been made and/or the principal agreement was *bona fide*.

Learned counsel for the defendant in their written submission before the learned Judicial Commissioner has expressly said that they did not raise any of those issues except only one issue *ie*, plaintiff has no *locus standi* to rely on and/or enforce the Glomac agreement as against the defendant due to the absence of privity of contract between plaintiff and the defendant under the Glomac agreement.

[50] The issue of "privity of contract" between plaintiff and the defendant in the Glomac agreement was not addressed on its merits by the learned Judicial Commissioner in his grounds of judgment. We find that the learned Judicial Commissioner fundamentally erred when he failed to even consider the defendant's only issue in opposing the originating summons. Had he done so, he would have come to the inevitable conclusion that there is no privity of contract between the plaintiff and the defendant under the Glomac agreement. Consequentially, plaintiff cannot rely on and/or enforce the Glomac agreement as against the defendant.

[51] It is our respectful view that the learned Judicial Commissioner's decision was plainly wrong as the doctrine of privity of contract is well settled and it is indisputable that plaintiff is not a party to the Glomac agreement which forms the basis of his originating summons against the defendant.

Conclusion

[52] Based on the above finding, we are satisfied that the learned Judicial Commissioner was plainly wrong in allowing the plaintiff's case. We find that there was "insufficient judicial appreciation of evidence". The learned Judicial Commissioner was plainly wrong when he made orders and grant reliefs in favour of the plaintiff that flow from or consequential upon or ancillary to the decision of the courts in the previous suit without taking into any consideration on one single issue on its merits tendered by the defendant *ie*, whether the plaintiff has any contractual rights to enforce his rights under the Glomac agreement against the defendant.

[53] The absence of a privity of contract between both the plaintiff and the defendant under the Glomac agreement renders the originating summons a non-starter. Not only the plaintiff has no cause of action against the defendant but also has no recourse against the defendant under the Glomac agreement. Be that as it may, the learned Judicial Commissioner also did not consider whether the plaintiff had *locus standi* to commence legal proceedings *vide* the originating summons premised on the Glomac agreement. As a result, the learned Judicial Commissioner has committed an error in his decision which required interference from this court to correct the decision.

[54] We agree with learned counsel for the defendant that the plaintiff's recourse is against Austral Development or Score Option under the sale and purchase agreement dated 15 January 2010 which is still subsisting to which the plaintiff was a party and not against the defendant.

[55] In the premise, it is our unanimous decision that the defendant's appeal is allowed and the High Court order dated 15 September 2020 is set aside. We order costs of RM20,000 to be paid by the plaintiff to the defendant subject to allocatur.